

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint
Petition of:

COREY BEITO, JR.,

No. 77973-2

PETITIONER'S
SUPPLEMENTAL
MEMORANDUM

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 JUL 21 PM 4:47

- A. PURSUANT TO HALL AND HAGAR THIS COURT
SHOULD GRANT DISCRETIONARY REVIEW AND
GRANT MR. BEITO'S PETITION

Mr. Beito filed a Personal Restraint Petition (PRP) alleging
the aggravated exceptional sentence imposed in his case violated
his Fifth Amendment right to be free of double jeopardy, his Sixth
Amendment right to a jury trial, and his Fourteenth Amendment due
process right to proof beyond a reasonable doubt of the elements
of his offense. Mr. Beito requested the court appoint counsel
pursuant to RCW 10.73.150.

The State, relying on the Court of Appeals decision in State
v. Hagar, 126 Wn.App. 320, 105 P.3d 65 (2005), responded that
Mr. Beito's sole remedy was to withdraw his guilty plea.

On September 14, 2005, Mr. Beito filed a motion to stay
consideration of his petition because this Court had granted review
of the Court of Appeals decision in Hagar.

The Acting Chief Judge of the Court of Appeals, Division One denied the stay and instead entered an order dismissing Mr. Beito's PRP on October 19, 2005. The order concluded Mr. Beito's PRP failed to make a showing of constitutional error because pursuant to the Court of Appeals opinion in Hagar, 126 Wn.App. 320 he was not entitled to relief unless he sought to withdraw his guilty plea. The order also relied upon the Court of Appeals decision in State v. Maestas, 124 Wn.App. 352, 101 P.3d 426 (2004),) to conclude no double jeopardy violation occurred, despite the fact this Court had overruled Maestas, 154 Wn.2d 1033, 119 P.3d 852 (2005). Finally, the acting chief judge failed to grant Mr. Beito's motion to appoint counsel as required by RCW 10.73.150(4).

Mr. Beito filed the present Motion for Discretionary review asserting the Court of Appeals erred in concluding Mr. Beito was required to withdraw his plea. Mr. Beito also asserted the acting chief judge failed to comply with the provisions of RCW 10.73.150 by failing to appoint counsel, and the provisions of RAP 16.11 barring the chief judge from dismissing on his own a nonfrivolous PRP on the merits.

This Court then stayed consideration of the petition pending its resolution of Hagar. This Court subsequently reversed Hagar, State v. Hagar, 154 Wn.2d, 369; 144 P.3d 298 (2006), concluding a defendant could assert a Sixth Amendment violation without being forced to withdraw his plea. Hagar necessarily concluded that a guilty plea to a substantive offense alone was not a waiver of the defendant's Sixth Amendment right to jury determination of the facts necessary to support aggravating elements.

Following its decision in Hagar, this Court directed the State to file a response to Mr. Hagar's motion for discretionary review.

In its response, the State conceded the order dismissing Mr. Beito's PRP was in error. Specifically the State conceded the exceptional sentence violated the Sixth Amendment because it was not based upon either a jury finding beyond a reasonable doubt as required by the Sixth Amendment nor a waiver by Mr. Beito of that right. The State conceded further, that pursuant to this Court's decision in Hagar Mr. Beito need not seek to withdraw his guilty plea. Response at 7. However, for the first time, the State claimed Mr. Beito had failed to provide a sufficient record from which to conclude he was prejudiced by the constitutional error. Response at 7-8. Specifically, the State contended the conceded error was

harmless because Mr. Beito had failed to show that a jury would not have found the aggravating factors. Response at 8. The State did not challenge Mr. Beito's contention that he was entitled to the appointment of counsel nor his contention that the Acting Chief Judge lacked the authority to rule on the merits of the petition.

Mr. Beito filed a reply in which he argued the error in his case could not be found harmless. Mr. Beito relied upon this Court's decision in State v. Hughes that the version of the Sentencing Reform Act in effect at the time of Mr. Beito's offense and sentencing specifically required the trial judge to make the factual findings necessary to support an exceptional sentence. 154 Wn.2d 118, 149, 110 P.3d 192 (2005). Hughes concluded there was no procedure within the Sentencing Reform Act (SRA) which permitted a jury to find the aggravating facts necessary to support an exceptional sentence. Id. Thus, Mr. Beito argued that under the law as it existed at the time of his plea and sentence he could not have received a statutorily valid exceptional sentence based upon a jury finding of the aggravating factors.

This Court than stayed consideration of the motion for discretionary review pending its resolution of State v. Recuenco,

74964-7, following remand of that case from the United States Supreme Court.

This Court subsequently decided In re the Personal Restraint of Hall, in which it held that a Blakely error challenged by PRP could not be deemed harmless when the relevant sentencing statutes

explicitly directed the *trial court* to make the necessary factual findings to support an exceptional sentence and did not include any provision allowing a jury to make those determinations during trial, during a separate sentencing phase, or on remand.

(Italics in original, brackets and internal quotations omitted.) 163 Wn.2d 346, 352, 181 P.3d 799 (2008). The Court's conclusion in Hall squarely rejects the State's prejudice argument in Mr. Beito's case. As in Hall, Mr. Beito need not demonstrate that which was legally impossible; that a jury would not have found the aggravating factors.

Pursuant to Hagar and Hall, Mr. Beito is entitled to relief and this Court should grant his petition.

B. IN GRANTING MR. BEITO'S PETITION THE COURT SHOULD DIRECT THE TRIAL COURT TO IMPOSE A STANDARD RANGE SENTENCE

In 2005, subsequent to Mr. Beito's offense and sentencing, and subsequent to this Court's decision in Hughes, the Legislature

amended the SRA to require jurors as opposed to judges determine the facts necessary to impose an exceptional sentence. See RCW 9.94A.535. In State v. Pillatos, this Court concluded these provisions could apply only to “pending criminal matters where trials have not begun or pleas [have] not yet [been] accepted.” 159 Wn.2d 459, 470, 150 P.3d 1130 (2007).

The Legislature again amended RCW 9.94A.535, effective April 18, 2007, to provide:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider *any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence*, at the new sentencing hearing.

(Emphasis added.) RCW 9.94A.537(2). By its plain language this statute limits its application to aggravating circumstances which first are listed in RCW 9.94A.535(3); **and** second, were relied upon in imposing the initial sentence.

In Mr. Beito’s case the trial court imposed an exceptional sentence based solely on its finding

. . . the rape (forcible and of a child) and subsequent murder are sufficiently connected. This circumstance distinguishes this case from other crimes of premeditated murder in the first degree and forms a

basis to impose a longer sentence than the standard range.

PRP Appendix F at 4. The court also concluded the “evidence is insufficient to find the exceptional sentence basis of victim vulnerability or deliberate cruelty. . . .” *Id.*

RCW 9.94A.533 does not include an aggravating circumstance of a rape connected to a murder. Because the only aggravating factor relied found by the trial court in imposing the previous sentence is not listed in RCW 9.94A.533, RCW 9.94A.535(2) does not authorize the impaneling of a jury to consider that factor on remand. State v. Vance, 142 Wn.App. 398, 409, 174 P.3d 697 (2008).

This Court should grant Mr. Beito’s petition and remand for imposition of a standard range sentence.

C. THIS COURT SHOULD APPOINT COUNSEL FOR MR. BEITO

RCW 10.73.150 provides in relevant part

Counsel shall be provided at state expense to an adult offender convicted of a crime and to a juvenile offender convicted of an offense when the offender is indigent or indigent and able to contribute as those terms are defined in RCW 10.101.010 and the offender:

...

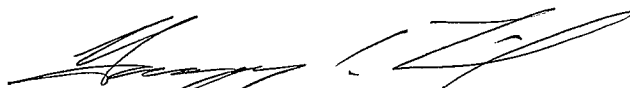
(4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief

judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11. Counsel shall not be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence
....

Mr. Beito filed a motion for appointment of counsel. As is clear the petition is not frivolous. Therefore, RCW 10.73.150 required the court to grant the motion to appoint counsel. Nonetheless the Court of Appeals failed to appoint counsel.

In addition to contending the Court erred in failing to appoint counsel, Mr. Beito filed a motion for appointment of counsel in this Court. Pursuant to RCW 10.73,150, this Court should both grant Mr. Beito's motion for appointment of counsel and rule the Court of Appeals erred in failing to appoint counsel.

Respectfully submitted this 21st day of July 2008.



Gregory C. Link - 25228
Washington Appellate Project – 91052
Attorneys for Petitioner

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IN RE PERSONAL RESTRAINT
PETITION OF

COA NO. 77973-2

COREY BEITO ,
Petitioner.

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 21ST DAY OF JULY, 2008 A COPY OF THE PETITIONER'S SUPPLEMENTAL MEMORANDUM WAS SENT TO THE PARTIES INDICATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] ANN MARIE SUMMERS
KING COUNTY PROSECUTING ATTORNEY
W554 KING COUNTY COURTHOUSE
516 THIRD AVE.
SEATTLE, WA 98104

[X] COREY BEITO
970246
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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY OF JULY, 2008

x Ann Joyce